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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 344

KENNETH JORDAN BROWN,
Petitioner

v.

STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT AND AUTHORITIES	3
I. The Affidavit Supporting The Search Warrant Stated Sufficient Facts To Satisfy The Probable Cause Requirements Of This Court	3
II. The Affidavit Supporting The Search Warrant Herein Is Adequate To State Probable Cause and, Accordingly, Evidence Obtained During The Subsequent Search, A Rent Receipt And A Res Gestae Admission By The Petitioner, Were Properly Admitted Into Evidence At Petitioner's Trial	6
III. It Is Proper For A State Trial Court To Limit Inquiry Into The Identity Of An Unnamed Informant Alluded To In A Search Warrant Affidavit Where Such Inquiry Is For Merely The Purpose Of Testing The Reliability Of The Probable Cause Allegations In The Affidavit And Where There Is No Showing Made That The Identity Of The Informant Would Be Relevant And Helpful In Establishing The Innocence Of The Defendant	6
IV. There Was Evidence Adduced At Petitioner's Trial In The State Court To Support Their Conviction	11
CONCLUSION	12
CERTIFICATE OF SERVICE	12

CITATIONS

CASES	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	5, 9
Garner v. Louisiana, 368 U.S. 157, 170 (1961)	11
Jones v. United States, 362 U.S. 257 (1960)	5
McCray v. Illinois, 386 U.S. 300 (1967)	7, 8
Roviaro v. United States, 353 U.S. 53 (1957)	7, 8
Rugendorf v. United States, 376 U.S. 528 (1963)	6, 7, 8, 9
Spinelli v. United States, 382 F.2d 871 (1967)	9
Thompson v. City of Louisiana, 362 U.S. 199, 206 (1960)	11
United States v. Gosser, 339 F.2d 102 (1964) cert. denied 382 U.S. 819 rehearing denied 382 U.S. 922 (1965)	10
United States v. Ventresca, 380 U.S. 102 (1965)	6

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet been reported. A copy of the opinion is attached as an appendix to the Petition for Writ of Certiorari.

JURISDICTION

The decision of the Court of Criminal Appeals of Texas was rendered on March 20, 1968 and Motion for Rehearing was overruled on May 8, 1968. Petitioner filed this Petition for Writ of Certiorari on July 27, 1968, in which he asserts that he was denied due process

as guaranteed by the Fourteenth Amendment to the United States Constitution. Accordingly, the jurisdictional requirements would appear to be satisfied although Respondent disputes Petitioner's contentions that rights guaranteed by the Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents four questions which he asserts should be reviewed by this Court. These questions may be restated and summarized as follows:

1. Does the affidavit, executed in support of the search warrant, on its face, show sufficient facts to establish probable cause for the issuance of the search warrant?

2. If the affidavit supporting the search warrant does not properly state probable cause, was the admission of a rent receipt seized during the search proper and was an incriminating res gestae statement made by Petitioner properly received into evidence?

3. May a defendant go behind the face of the search warrant to test the probable cause averments therein when to do so would disclose the identity of an unnamed informant where the defendant made no showing that the informant's identity would be relevant and helpful in establishing the innocence of the defendant?

4. Was the conviction herein based upon no evidence with a resultant denial of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment and the Fourth Amendment of the Constitution

of the United States are involved herein. The petition at page 4 sets out these pronouncements.

STATEMENT OF THE CASE

While Respondent disagrees with some of the inferences and concluded facts made in Petitioner's "Statement of the Case," the "Statement" is acceptable for the purpose of arguing the applicable law in this cause. However, certain additional facts relevant to the issues are set out in Respondent's Argument.

ARGUMENT AND AUTHORITIES

I. The Affidavit Supporting The Search Warrant Stated Sufficient Facts To Satisfy The Probable Cause Requirements Of This Court.

In any inquiry into the adequacy of a search warrant affidavit, consideration must be given to the kind or genre of information furnished to the magistrate for his consideration in passing on the existence of probable cause for the issuance of the search warrant. Generally, the information submitted to a magistrate may be said to be of three types or classes:

The first is personal information of the affiant. When the affiant has personal knowledge of the location of the contraband or evidence to be seized, he can describe this information and how it was obtained to the magistrate by affidavit and a strong showing of probable cause is made.

The second genre is hearsay information obtained by the affiant. In such a case, the circumstances surrounding and leading to the informant's knowledge of the whereabouts of the evidence to be seized must be disclosed to the magistrate along with information as

to the informant's reliability. Probable cause is satisfied when the magistrate can reasonably conclude that the informant is reliable and had the opportunity to observe the evidence in question or to reasonably form a belief as to its location.

The third class of information is a combination of personal knowledge of the affiant together with hearsay information from others that certain evidence is located in a particular place. Here, it is logical that facts relating to the reliability of the informant need not be as detailed nor is it necessary that facts showing how he gained his knowledge be as specific as when hearsay is relied upon alone. The personal knowledge of the affiant (gained through surveillance or investigation) can corroborate the informants information and prove his reliability.

In this case, the affidavit presented to and considered by the magistrate reads as follows:

> ". . . On the 11th day of March, 1966, affiants received reliable information from a credible person, that Heroin was being possessed by Kenneth Brown, at 1100 West Dallas Street, Houston, Harris County, Texas. Although I do not desire to name this person, on several occasions he has given information to me concerning Narcotics being possessed by certain individuals, and on every occasion his information has proven to be true. Based upon the information he gave me, affiants on this day, the 11th of March, 1966, set up surveillance of the building located at 1100 West Dallas Street, and from 6 PM to 8 PM of this same date, we observed several persons who we knew to be users of narcotics, enter the building, remain for approximately five minutes each, and then leave."

Although the affidavit reflects that the information contained therein was based in part on hearsay information, such information may properly form the basis for a valid search warrant under the holding of *Jones v. United States,* 362 U.S. 257 (1960). Moreover, here, a part of the information forming the foundation upon which the magistrate rested his decision—that there was probable cause to believe that narcotics were secreted in and on the premises described—was the direct, personal observation and knowledge of the affiant who had conducted a personal surveillance of the house concerned and observed known narcotic users entering and leaving the premises.

Even if the circumstances upon which the informant based his belief and conclusion that narcotics were located in the house in question were not set out, his reliability was known to the affiant-police officer, who then acted on the informant's information and conducted a surveillance after which the affiant could reasonably conclude that narcotics were on the described premises. Accordingly, the information submitted by the informant, however received or obtained, buttressed by the affiant's own personal observation and knowledge, demonstrated sufficiently the existence of probable cause to satisfy the magistrate that heroin was located at the address described in the affidavit. This coupling of informant-information with direct information by the police officers would appear to satisfy the probable cause standards of *Aguilar v. Texas,* 378 U.S. 108 (1964).

To repeat, the unnamed informant whose reliability was known, told the police that heroin was located at the residence in question. While the facts and circum-

stances which would show how this information was obtained, were not set out, the officers acted on the information (believing from past experience that it was reliable) and obtained confirmation of the information by observing known narcotic users visiting the house for short times and then leaving. All of these related facts were made known to the magistrate who then properly concluded that there was probable cause to believe that narcotics were located on the premises. See *United States v. Ventresca,* 380 U.S. 102 (1965).

It should lastly be observed that it is not necessary to name the informant in the search warrant affidavit. *Rugendorf v. United States,* 376 U.S. 528 (1963).

Respondent submits that the affidavit supporting the search warrant which was issued in this case was adequate to enable the magistrate to find probable cause for the issuance of the warrant.

II. The Affidavit Supporting The Search Warrant Herein Is Adequate To State Probable Cause And, Accordingly, Evidence Obtained During The Subsequent Search, A Rent Receipt And A Res Gestae Admission By The Petitioner, Were Properly Admitted Into Evidence At Petitioner's Trial.

It is sufficient to state here that if the search warrant affidavit meets the standards set by this Court, as Respondent urges above, then it can be said that the ensuing search was valid and evidence obtained during the search, the rent receipt and the res gestae admission, were properly admissible.

III. It Is Proper For A State Trial Court To Limit Inquiry Into The Identity Of An Unnamed Informant Alluded To In A Search Warrant Affidavit Where Such Inquiry Is For Merely The Purpose Of Testing The Reliability Of The Probable Cause Allegations In The Affidavit And Where There Is No Showing Made That

The Identity Of The Informant Would Be Relevant And Helpful In Establishing The Innocence Of The Defendant.

In this case, the Petitioner attempted to learn the identify of the unnamed informant mentioned in the search warrant affidavit in order to test the reliability of the informant as vouched for by the officer-affiants. At pages 123 through 130 of Volume I of the Record, the Petitioner questioned the Magistrate, Sam M. Ing, concerning whether the affiants had given information to the magistrate as to the identity of the informant; however, the trial court held the questions to be improper.

At no time did the Petitioner show, or attempt to show, any special circumstances that would be pertinent as to the issue of guilt or innocence that would entitle him to have the identity of the informant revealed. See *Roviaro v. United States,* 353 U.S. 53 (1957), wherein this Court, at page 59, referred to the rule protecting against the disclosure of an informant's identity and observed:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

The rule permitting the nondisclosure of an informant is recognized in *Rugendorf v. United States,* 376 U.S. 528 (1963), and in *McCray v. Illinois,* 386 U.S. 300 (1967), which latter case discusses *Roviaro* at length.

In narcotics cases, the privilege against disclosing the names of informants is especially significant. Pre-

sumably, most such informers are narcotics users who make purchases from narcotic peddlers. Their identification, either through name or description would endanger the lives of these informants and would also destroy their effectiveness as a source of further information concerning narcotics violators.

There are strong policy reasons for denying to a defendant the right to inquire into the probable cause allegations contained in a search warrant affidavit. As discussed above, where an accused shows special circumstances that would go to his guilt or innocence, then an inquiry as to the identity of the informant should be permitted. But to disclose the informant solely to inquire into the probable cause as shown by the search warrant affidavit is an entirely different matter. Whether there is probable cause, or not, does not go to the guilt-innocence issue for the physical evidence seized as material. If an inquiry as to the informant is permitted in the probable cause area—a required disclosure of the name of the informant so as to merely determine his credibility as stated by the affiants—the name of the informant must perforce be disclosed in every case. Certainly the decisions in *Rovario v. United States,* supra; *Rugendorf v. United States,* supra and *McCray v. United States,* supra, negative such a conclusion.

Furthermore, permitting an investigation into probable cause as stated by a search warrant affidavit would destroy the function of the magistrate in passing upon probable cause. A confusing inquiry would result in every criminal trial where evidence has been obtained by the use of a search warrant. The credibility of informants and affiants could be tested by all the usual

modes of impeachment and the trial court would then redetermine probable cause with information before it that was unavailable to the magistrate. This procedure would run counter to the proposition expressed in *Aguilar v. Texas,* supra, wherein this Court noted in footnote 1 at page 109 of the Opinion that

> ". . . It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. . . ." (Emphasis is that of the Court.)

Again, in *Rugendorf v. United States,* supra, the Court took the position that any later examination into the validity of search warrants should be confined to the facts brought to the attention of the commissioner. At page 533 of the Opinion it was stated

> "We believe that there was substantial basis for the commissioner to conclude that stolen furs were probably in the Petitioner's basement. *No more is required.*" (Emphasis supplied)

Other courts have held that there can be no later inquiry beyond and behind the face and form of a search warrant affidavit. The United States Court of Appeals for the Eighth Circuit in *Spinelli v. United States,* 382 F.2d 871 (1967), now pending before this Court, stated at page 879,

> "The United States Commissioner in issuing the search warrant believed from the information in the affidavit that there was probable cause to believe the law was being violated on the described premises.
>
> "[7] Our duty on this appeal is not to make our independent determination of probable cause. Our duty is solely limited to the determination of whether the information before the Commissioner

was legally capable of persuading him, as a man of reasonable caution, that the laws of the United States were being violated with part of this violation consisting of an illegal act being committed on the described premises."

The United States Court of Appeals for the Sixth Circuit in *United States v. Gasser*, 339 F.2d 102 (1964) cert. denied 382 U.S. 819, rehearing denied 382 U.S. 922 (1965) observed at page 111 of the Opinion,

> "Probable cause for the issuance of a search warrant exists where the circumstances before the officer are such as to cause a man of reasonable prudence to believe that an offense is being committed. The Commissioner must exercise his own judgment as to whether the facts in the affidavit constitute probable cause and his determination is conclusive, unless his judgment is arbitrarily exercised."

Any subsequent judicial inquiry that goes behind a search warrant affidavit must almost inevitably develop facts that were not presented initially to the magistrate and so the re-determination of probable cause would be made upon evidence not before the commissioner. It would, therefore, seem logical for the prosecution as well as the defense to introduce additional evidence (perhaps even the fact that the contraband in question was located by the search) to buttress its attempt to show probable cause. This assertion, though ridiculous, is submitted as a logical consequence of permitting a trial court to determine probable cause on facts that were not presented to the magistrate initially.

Respondent urges that the principles of good jurisprudence are best served by limiting a review of the

magistrate's determination of probable cause to the search warrant affidavit.

IV. There Was Evidence Adduced At Petitioner's Trial In The State Court To Support Their Conviction.

This Court has held that it is a denial of "due process to convict and punish a man without evidence of his guilt." *Thompson v. City of Louisiana*, 362 U.S. 199, 206 (1960). See also *Garner v. Louisiana*, 368 U.S. 157, 170 (1961).

However, it cannot be said that there was no evidence here to support the Petitioner's conviction if the search warrant is valid as Respondent maintains. Heroin was found on the premises of the store which Petitioner managed. Moreover, the narcotics were found under a display case in a spot inaccessible except by raising the entire case. When exhibited to the Petitioner, he stated, "It is heroin. You have got me this time." Petitioner was then arrested and searched, and a rental receipt for an apartment was found in his billfold. A search of this apartment revealed a set of scales suitable for the purpose of weighing drugs together with three papers with traces of heroin on them.

Unescapably, the conclusion must be reached that there was evidence upon which to convict the Petitioner of the unlawful possession of heroin.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Carl E. F. Dally, 1512 First City National Bank Building, Houston, Texas 77002, on this the ____ day of October, 1968.

LONNY F. ZWIENER
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